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No. 86-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RHODE ISLAND PUBLIC UTILITIES COMMISSION, NEW JERSEY BOARD OF PUBLIC UTILITIES,

Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in determining that States or state governmental entities which sell Niagara Project preference power at wholesale to publicly and privately-owned utilities, which then resell the power at retail to residential customers, are not "public bodies" under Section 836(b)(1) of the Niagara Redevelopment Act, 16 U.S.C. §836(b)(1)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
REASONS FOR NOT GRANTING THE CROSS-PETITION	3
I. THE DECISIONS BELOW DO NOT VIOLATE THIS COURT'S TEACHINGS ON THE PROPER DECISIONMAKING ROLES OF ADMINISTRATIVE AND JUDICIAL BODIES	5
II. RI/NJ HAVE NOT DEMONSTRATED THE EXISTENCE OF A CONFLICT OR "CONFUSION" REQUIRING RESOLUTION BY THIS COURT	8
III. THE CROSS-PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF BOTH THE NRA'S LANGUAGE AND ITS LEGISLATIVE HISTORY IS CORRECT	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

Cases:

Bread Political Action Committee v. *FEC*, 455 U.S. 577 (1982) 10

Caminetti v. *United States*, 242 U.S. 470 (1917) 9

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 10

Harrison v. *Northern Trust Co.*, 317 U.S. 476 (1943) 10

Metropolitan Transportation Authority v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986), *petition for cert. filed*, Docket No. 86-736 (U.S. Nov. 3, 1986) 2, 7, 8, 9,11

PASNY v. *FERC*, 743 F.2d 93 (2d Cir. 1984) 4,5,6,7,8

Phillips Petroleum Co. v. *FERC*, 792 F.2d 1165 (D.C. Cir. 1986) 7

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 7

United States v. *Donruss Co.*, 393 U.S. 297 (1969) .. 10

United States v. *Menasche*, 348 U.S. 528 (1955) 11

Regulatory Orders and Opinions:

Opinion No. 151, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference," 21 FERC ¶ 61,021 (Oct. 13, 1982) 7

Opinion No. 229, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference Power for States Neighboring New York," 30 FERC ¶ 61,323 (Mar. 27, 1985) 2, 5, 6, 10

Page

Regulatory Orders and Opinions (Cont'd.):

Opinion No. 229-A, "Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time," 32 FERC ¶ 61,194 (July 30, 1985) 2, 5, 6, 9

State of Vermont Public Service Board v. *PASNY*, 55 FPC 1109 (1976) 4, 5, 6, 7, 8

Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, et al. v. *Power Authority of the State of New York*, FERC Docket Nos. EL86-29, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶ 61,333 (June 13, 1986) .. 3

Statute:

Niagara Redevelopment Act, Sections 836(b)(1) and (2), 16 U.S.C. §§ 836(b)(1) and (2) ..... *passim*

Legislative Materials:

S. Rep. No. 539, 85th Cong., 1st Sess. (1957) 12

H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1585 12

Supreme Court Rules:

Rule 17.1 3

Rule 20.5 3

Rule 28.1 2

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INTRODUCTION

This brief is filed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"), intervenors in the proceedings below and respondents before this Court, in opposition to the cross-petition of the Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities (collectively referred to as "RI/NJ") for a writ of certiorari. MMWEC and CMEEC represent the interests of entities which have been found to be Niagara Redevelopment Act ("NRA") "public bodies," and are currently receiving allocations of Niagara Project "preference power."[1] NRA

[1] CMEEC and MMWEC, which are political subdivisions of the states of Connecticut and Massachusetts, respectively, serve as bulk power supply agencies for municipal electric distribution system members. MMWEC is composed of 34 member systems; CMEEC is composed of three member systems, known as "Participants." Information concerning

Section 836(b)(1), 16 U.S.C. §836(b)(1), the NRA "preference provision," states in pertinent part that in disposing of 50 percent of the output of the Niagara Project the Power Authority of the State of New York ("PASNY"), the Project licensee, "shall give preference and priority to public bodies and nonprofit cooperatives. . . ."

RI/NJ seek review of that portion of the judgment of the United States Court of Appeals for the Second Circuit in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, 796 F.2d 584 (2d Cir. 1986),[2] which held, affirming the determination of the Federal Energy Regulatory Commission ("FERC"), that only publicly-owned entities which are capable of selling and distributing power directly to consumers at retail are NRA "public bodies" and qualify for the purchase of NRA preference power. On the basis of this finding the Commission, and the court, held that the Vermont Department of Public Service ("VDPS"), a state agency which procured NRA preference power from PASNY and sold it at wholesale to publicly and privately-owned utilities for sale and distribution to the utilities' residential customers, was not an NRA "public body." Like the "old VDPS,"[3] the Rhode Island Public Utilities Commission and the New Jersey Board of Public Utilities are state agencies which, as "designated

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the corporate structures of CMEEC and MMWEC, as required by Supreme Court Rule 28.1, is included at p. ii of the Dec. 22, 1986, brief submitted by MMWEC and CMEEC in opposition to the Nov. 3, 1986, petition for writ of certiorari filed by the Metropolitan Transportation Authority ("MTA") in *Metropolitan Transportation Authority* v. *Federal Energy Regulatory Commission*, Supreme Court Docket No. 86-736.

[2] The Second Circuit's opinion is contained in the appendix to the MTA's petition for a writ of certiorari, Supreme Court Docket No. 86-736, at A1-A20.

[3] Following the issuance of FERC Opinion Nos. 229, "Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York," 30 FERC ¶ 61,323 (Mar. 27, 1985) (MTA Petition Appendix at A49-A85), and 229-A, "Opinion and Order on Rehearing Clarifying Opinion in Part, and Granting Petitions to Intervene Out of Time," 32 FERC ¶ 61,194 (July 30, 1985) (MTA Petition Appendix at A23-A48), the State of

bargaining agents" for their respective states, *see* NRA Section 836(b)(2), 16 U.S.C. §836(b)(2), seek to circumvent the NRA's preference provision by purchasing NRA preference power from PASNY for resale almost exclusively to each state's privately-owned utilities for resale at retail to their residential customers.

MMWEC and CMEEC contend that the cross-petition should be denied for two reasons. First, denial is appropriate because the MTA's petition for certiorari, acceptance of which is a prerequisite for consideration (let alone acceptance) by this Court of RI/NJ's cross-petition, *see* Supreme Court Rule 20.5 and Cross-Petition at 8, is wholly without merit.[4] Second, even if MTA's petition is granted, the cross-petition should be denied because RI/NJ have not demonstrated any special or important reason for the exercise of this Court's discretion as required under Supreme Court Rule 17.1.

REASONS FOR NOT GRANTING THE CROSS-PETITION

RI/NJ allege five reasons (Cross-Petition at 8) why their cross-petition should be granted. First, RI/NJ claim that if the Court grants MTA's certiorari petition, but does not also resolve RI/NJ's "State access" issue, the Court will not be reviewing all facets of the NRA "public bodies" issue. RI/NJ are correct that the issue posed here differs from that posed by

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Vermont passed legislation which purports to transform the VDPS, a power wholesaler, into a retail distributor. The issue of whether or not "new VDPS" is an NRA "public body" is currently before the FERC. *See Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, et al.* v. *Power Authority of the State of New York*, FERC Docket Nos. EL86-29, *et al.*, "Order Establishing a Hearing, Granting Interventions, Extending the Time for the Filing of Motions to Intervene, Consolidating Proceeding, and Denying Motion to Initiate Enforcement Action," 35 FERC ¶ 61,333 (June 13, 1986). New Jersey and Rhode Island seek to duplicate the "old," rejected Vermont arrangement.

[4] On December 22, 1986, MMWEC and CMEEC filed a joint brief in opposition to MTA's petition for a writ of certiorari in Supreme Court Docket No. 86-736.

MTA. However, the existence of the difference does not counsel the granting of the cross-petition. The MTA question — whether a public agency which consumes preference power is an NRA "public body" — can be heard and resolved regardless of whether the question raised by RI/NJ — whether a public agency which wholesales power to privately-owned utilities for resale to their residential customers is an NRA "public body" — is heard by the Court.[5] RI/NJ failed to file their own timely petition for certiorari, and cannot bootstrap their request to MTA's by claiming that the two petitions raise issues that must be heard together.

Second, RI/NJ allege (Cross-Petition at 8, 21-26) that in interpreting the NRA phrase "public bodies" the FERC improperly relied upon the Second Circuit's decision in *PASNY* v. *FERC*, 743 F.2d 93 (2d Cir. 1984) ("*PASNY*"), a decision which was itself an affirmance of an earlier FERC opinion on the meaning of the NRA preference provision. MMWEC and CMEEC will demonstrate that FERC's decision to address and apply *PASNY* was correct, and that, contrary to the assertions of RI/NJ, it would have been error for FERC simply to ignore the Second Circuit's decision.

Third, RI/NJ contend (Cross-Petition at 8, 26-29) that Supreme Court review is needed to resolve the conflict between the holding here and FERC's prior *dictum* in *State of Vermont Public Service Board* v. *PASNY*, 55 FPC 1109 (1976) ("*VPSB*") that VDPS was an NRA "public body." MMWEC and CMEEC will briefly rebut this claim by demonstrating that there is no conflict. FERC correctly concluded, upon review for the first time of the evidence relevant to this issue, that the *dictum* in *VPSB* was in error, and that it should be overruled.[6]

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[5] Thus, a major portion of RI/NJ's cross-petition (Section I, at 8-11), which is devoted to explaining the difference between the "State access" issue here and the issue raised by MTA, demonstrates that the cross-petition should be denied rather than granted.

[6] RI/NJ would have this Court believe that whenever a judicial body reverses earlier, erroneous *dictum*, a "conflict" is created.

Finally, RI/NJ claim (Cross-Petition at 8, 12-21) that Supreme Court review is merited because of two errors in the analyses employed by the Second Circuit and the FERC in determining the meaning of the phrase "public bodies." First, RI/NJ contend (Cross-Petition at 12-17) that in interpreting the phrase "public bodies" the Second Circuit and FERC improperly ignored the term's "plain meaning." Second, RI/NJ claim (Cross-Petition at 17-21) that the court misread an unenacted version of the bill which became the NRA. MMWEC and CMEEC will briefly address and refute these erroneous attacks on the decisions below.

I. THE DECISIONS BELOW DO NOT VIOLATE THIS COURT'S TEACHINGS ON THE PROPER DECISIONMAKING ROLES OF ADMINISTRATIVE AND JUDICIAL BODIES

RI/NJ argue at length (Cross-Petition at 21-26) that Opinion Nos. 229 and 229-A, and the Second Circuit's decision affirming the opinions, are "defective" because in reaching its decision the FERC did not independently evaluate the issue in this case. Instead, the Commission "abdicated its decisional responsibility" (Cross-Petition at 21), by basing its opinion entirely upon the Second Circuit's *PASNY* decision. RI/NJ allege (Cross-Petition at 24-26) that FERC's action violates rulings by this Court that agencies must, in the first instance, interpret statutes they are charged with administering.

These contentions are erroneous; as will be shown here, the FERC correctly exercised its decisional responsibility below, and the court properly affirmed the FERC's judgment. Moreover, RI/NJ have misread this Court's rulings. The cases cited by RI/NJ (Cross-Petition at 24-25) refer to the deference due an agency's reading of a statute the agency administers. These cases do not refer to, let alone establish, an agency obligation to interpret a statute while totally disregarding judicial interpretation of the same law.

In Opinion No. 229, the FERC overruled that portion of the *VPSB* decision which determined that the VDPS (then

known as the Vermont Public Service Board) was an NRA "public body."[7] This reversal was necessary because the legal premise underlying the determination in *VPSB*, that the NRA preference provision was designed to insure that power was received by a specific set of customers, *i.e.*, "domestic and rural customers," rather than a specific set of utilities, *i.e.*, consumer and publicly-owned retail distributors, was subsequently held in *PASNY* to be incorrect. 743 F.2d at 105.[8] The legal basis for its prior conclusion having been expressly rejected, FERC was of course obligated to reexamine the "public bodies" issue, and it properly did so. Upon completing its examination, which was conducted independent of the decision in *PASNY*, the FERC concluded that VDPS did not meet the NRA's "public bodies" criteria. As explained by the FERC in Opinion No. 229-A, 32 FERC at 61,450 n.5, MTA Petition Appendix at A28 n.5:

> Thus, while the Second Circuit's opinion dictated the reappraisal [of the *VPSB* decision], the court's decision did not compel us to reach any specific conclusion. Rather, it was our own reevaluation of the statute and its legislative history in this case which dictated the result we reached.

RI/NJ contend that Supreme Court review (and reversal) is required because: (1) the decision that the NRA established a preference on behalf of a type of utility rather than a specified set of "end-users" was in fact made by the Second Circuit in *PASNY* rather than by the FERC; and (2) the FERC improperly chose to apply that decision, rather than blindly sticking to its own earlier pronouncement on the meaning of the NRA preference clause.

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[7] In *VPSB*, the Federal Power Commission did not allocate any of the NRA preference power in question to Vermont. Thus, this determination was *dictum* and could not then be appealed.

[8] FERC (then the Federal Power Commission) concluded in *VPSB* that so long as the VPSB was a public agency, and was insuring that the power was being distributed to rural and domestic customers, it was legally irrelevant that the power was being sold at wholesale to investor-owned utilities for resale to their customers. 55 FPC at 1113.

These arguments are legally and factually untenable. They are legally untenable because, as this Court held in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943), and RI/NJ note in their cross-petition (at 25), "an order may not stand if the agency has misconceived the law." The *PASNY* decision held that the NRA contained a "federal-type," or utility-oriented preference, rather than an "end-use," or customer-oriented preference. FERC had misconstrued the law in *VPSB* and was obligated to reexamine and, if necessary, overrule the earlier judgment. Had FERC ignored the *PASNY* decision and affirmed *VPSB*, the court in *MTA* v. *FERC* would have been obligated to reverse the Commission consistent with the court's earlier ruling.

The argument is factually untenable because RI/NJ ignore that the Second Circuit's *PASNY* decision on the nature of the NRA preference was itself an affirmance of a prior determination by the FERC. The Commission ruled in Opinion No. 151, "Declaratory Opinion and Order Affirming with Modifications Initial Decision on Niagara Preference," 21 FERC ¶ 61,021 (Oct. 13, 1982), following its first opportunity to review the legislative history, that (contrary to its earlier finding) there is no end-use preference in the NRA. *Id.* at 61,134-35. The Second Circuit affirmed that ruling. *PASNY*, 743 F.2d at 105. By following the ruling in *PASNY*, FERC was simply following its own interpretation of NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), as affirmed by the Second Circuit.

Thus, contrary to RI/NJ's assertions (Cross-Petition at 24), this is not a situation where the court has "preempt[ed]" the agency's decisionmaking role or the agency has ignored that role. Both FERC and the court have properly performed their roles. Nor is this a case like *Phillips Petroleum Co.* v. *FERC*, 792 F.2d 1165 (D.C. Cir. 1986) (Cross-Petition at 24-25). In *Phillips*, the court remanded the matter before it to the FERC because the Commission had erroneously concluded that an earlier decision by this Court resolved the statutory dispute in *Phillips*. 792 F.2d at 1170. In other words, FERC did not err by relying upon a Supreme Court decision to decide a legal issue, but had incorrectly interpreted the holding of that decision. *Id.* at 1170-71. Here, the FERC properly chose to apply a relevant Second Circuit decision, and, unlike *Phillips*, there is no argument that

the FERC misread the Second Circuit's determination. RI/NJ merely contend that both FERC and the Second Circuit were wrong.

II. RI/NJ HAVE NOT DEMONSTRATED THE EXISTENCE OF A CONFLICT OR "CONFUSION" REQUIRING RESOLUTION BY THIS COURT

RI/NJ contend (Cross-Petition at 26-29) that the *MTA* v. *FERC* decision has created two areas of conflict or "confusion" which should be resolved by this Court: (1) the "administrative level" conflict between the Commission's 1976 *VPSB* decision on the "public bodies" issue and the FERC decision below; and (2) the "federal appellate level" conflict between the statutory analysis applied by the Second Circuit in *PASNY* and that applied in *MTA* v. *FERC*. MMWEC and CMEEC will demonstrate here that Supreme Court review is not needed because no such conflicts exist.

As discussed in Section I, *supra*, the FERC fully explained its decision to overrule the *VPSB* finding on the "public bodies" issue. RI/NJ admit (Cross-Petition at 27) that the Commission may reinterpret a statute "if there is a rational basis" for doing so, but argue that such action was "unjustified" here. Here, the basis for the decision is plain: the key legal finding on which the earlier FPC determination was based, *i.e.*, the intended focus of the NRA preference provision, was found (upon review for the first time of all of the relevant evidence) to be incorrect. Absent that legal basis, the ruling in *VPSB* could not be affirmed by FERC without consideration of its own and the Second Circuit's more recent rulings, and it would have been "irrational" and "unjustifiable" for FERC to have done so.

Second, RI/NJ have not demonstrated the presence of any "confusion" between the statutory analyses applied by the Second Circuit in the two cases referred to above. The court's observation in *PASNY* (quoted in the Cross-Petition at 28) as to alternative language which could have been adopted by Congress in drafting the NRA preference clause does not compel

a different result in *MTA* v. *FERC*. The legislative history referred to and the analysis engaged in by the Second Circuit fully support the result reached. The issue before FERC and the court was not what Congress could have written in the preference clause, but what Congress in fact wrote. RI/NJ have not demonstrated that the analysis below of what was enacted by Congress is erroneous.

III. THE CROSS-PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF BOTH THE NRA'S LANGUAGE AND ITS LEGISLATIVE HISTORY IS CORRECT

RI/NJ allege two errors in the Second Circuit's (and the FERC's) analysis of the NRA phrase "public bodies." First, the court erred by looking beyond the "plain meaning" of the statutory language and interpreting the provision in accordance with the NRA's extensive legislative history (Cross-Petition at 12-17); and second, the court misread that history (Cross-Petition at 17-21). Neither contention is correct, and therefore neither justifies Supreme Court consideration of this case.

First, "plain meaning" analysis may be used only where it is demonstrated that such a meaning exists. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The FERC found that the "term 'public bodies' is not as unambiguous as the parties suggest." Opinion No. 229-A, 32 FERC at 61,443, MTA Petition Appendix at A29. The accuracy of FERC's position is demonstrated by, *inter alia*, the disagreement among the petitioners themselves as to the statute's "plain meaning." MTA, the granting of whose petition is a prerequisite to a determination of whether or not to hear this cross-petition, contends (MTA Petition at 11) that the statute "plainly means" that any public body in the "literal sense," whether or not capable of distribution to residential customers, is eligible to purchase preference power. RI/NJ claim (Cross-Petition at 15) that so long as the power is sold through a public agency to residential customers, the statutory criteria are being met. Thus, MTA would presumably be ineligible to receive preference power were RI/NJ's "plain meaning" to prevail, while

this Court would be an NRA "public body" if MTA's view were held to be correct. Where the statute's meaning is not "plain," resort to extrinsic aids such as legislative history is "plainly" appropriate. *See, e.g., United States* v. *Donruss Co.*, 393 U.S. 297, 303 (1969).

Second, RI/NJ admit (Cross-Petition at 13) that even where, unlike here, the meaning of statutory language is "plain," this meaning cannot prevail where it violates "a clearly expressed legislative intention to the contrary. . . ." *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982), quoting *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Thus, even if RI/NJ were correct that the NRA term "public bodies" had a "plain meaning," a court would still be justified in examining the legislative history and failing to adopt the "plain meaning" if that legislative history did not support the proposed reading of the language. *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479 (1943).

Here, the Second Circuit and the FERC correctly rejected the "plain meanings" proposed by the parties to this case. MTA's "plain meaning" could not be adopted because, as noted by the FERC, Opinion No. 229, 30 FERC at 61,651, MTA Petition Appendix at A66, MTA's view that any public agency qualifies as an NRA "public body" ignores NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), which embodies a congressional expectation that preference power would be made available for "sale and distribution . . . [to] the people as consumers . . . at the lowest rates reasonably possible. . . ." Similarly, RI/NJ's "plain meaning" would permit the sale of preference power needed by publicly-owned utilities to investor-owned utilities. Such sales are at odds with NRA Section 836(b)(1), 16 U.S.C. §836(b)(1), which states that sales of preference power to "utility companies organized and administered for profit" are permissible only where the power is not needed by legitimate "public bodies," and where such sales are made on a withdrawable basis in order that the preference for "public body" needs can be effectuated. Thus, FERC could adopt neither position, for "plain meaning" analysis does not permit the interpreter to disregard any portion of the statute or reduce

such language to "mere surplusage." *See e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). In such a case, the FERC and the Second Circuit properly looked to the legislative history to insure that the provision would be interpreted consistent with congressional intent.

RI/NJ then contend (Cross-Petition at 17-21) that the Second Circuit (and the Commission) misread the legislative history of the statute. In RI/NJ's view (Cross-Petition at 21), the history provides no basis for the conclusion that the term "public bodies" was intended to be limited to publicly-owned retail electric distributors. Instead, RI/NJ argue, on the basis of an analysis of the preference provisions contained in two bills which were *not* enacted, and unsupported assertions as to the bases for congressional compromises,[9] that the legislative history establishes that non-distributor State entities, which function as power conduits to investor-owned utilities, were intended to be NRA "public bodies."

The Second Circuit analyzed the relevant legislative history in detail, 796 F.2d at 591-93, MTA Petition Appendix at A11-A16, and correctly concluded that NRA "public bodies" must be "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." 796 F.2d at 593, MTA Petition Appendix at A16. The court's analysis of that history refutes in full RI/NJ's position, and MMWEC and CMEEC will not reiterate that extensive analysis here.[10]

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[9] *See* the RI/NJ's bald assertion (Cross-Petition at 20) that there "was no intent in Congress to insert in the NRA a stronger municipal preference provision than included in the Clark bill."

[10] As convincing as the Second Circuit's analysis is, there is a great deal of additional, consistent material concerning the nature of the NRA preference and other federal preference laws upon which the court could have relied had it not wished to avoid redundancy. There is no legislative history to support the asserted proposition that preference power earmarked for cooperatives and public bodies can be laundered through a state regulatory agency (such as the petitioners here) and sold to the very privately-owned utilities to which Congress intended to apply competitive pressure.

However, MMWEC and CMEEC would note that RI/NJ, by basing their argument exclusively upon interpretations of two unenacted pieces of legislation, have ignored the Senate and House Reports issued on the bill which actually was enacted as the NRA. Those reports, which describe and discuss the language of the NRA itself, make plain that the FERC and the Second Circuit have correctly analyzed Congress' criteria for qualifying as an NRA "public body." The Senate Report, No. 539, 85th Cong., 1st Sess. (1957), refers (at 6) to a preference for "distributors," and to preference customers as "municipals" and "rural electric cooperatives" (Report at 13; *see* Table contained in the minority report detailing "Estimated demand of preference customers. . . ."). The House Report, No. 862, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1585, refers (at 1593) to a "federal preference policy" on behalf of "public distribution systems."

CONCLUSION

For all of the above reasons, the Court should deny the request for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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